UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

In re:

Case No. 9:02-bk-25329-ALP
Chapter 11 Case

HANCOCK PROPERTIES MANAGEMENT INC.,
Debtor. /

SHARI S. JANSEN, successor Chapter 7 Trustee,

Plaintiff,

vs. Adv. Pro. 9:03-ap-361

VOLUTE ENTERPRISES, INC., REID SCHAEFER, and GINA HYON a/k/a GINA SCHAEFER

Defendants.
. /

ORDER ON DEFENDANTS' MOTION FOR RELIEF FROM DEFAULT JUDGMENT ORDERS UNDER FEDERAL RULE OF BANKRUPTCY PROCEDURE 9024
(Doc. No. 62)

THE MATTER under consideration in this Chapter 7 liquidation case is a Motion for Relief from Default Judgment filed by Reid Schaefer (Mr. Schaefer), Gina Hyon (Ms. Hyon) and Volute Enterprises, Inc., (Volute) the Defendants named in a Complaint filed by Shari Jansen, the Successor Trustee for the estate of Hancock Properties Management, Inc. (the Debtor).

At the duly scheduled and noticed hearing on the Motion, this Court heard argument of counsel for the Trustee and for the Defendants, considered the affidavits filed by both the Trustee and the Defendants, together with the relevant portion of the record, and based on same now finds and concludes as follows.

The Debtor is a Florida corporation, Mr. Schaefer and his wife, Ms. Hyon, were the principals and sole stockholders of the Debtor. Sometime prior to December 2002, the Defendants engaged the services of L. Kirk Rogers (Ms. Rogers), an attorney, for the purpose of representing the corporation in this bankruptcy case. On December 20, 2002, Ms. Rogers filed the Voluntary Petition for relief for the Debtor under Chapter 11. The Debtor was unable to proceed with its Chapter 11 case, converted its case to a Chapter 7 case. Initially, the Chapter 7 Trustee appointed to the estate of the Debtor was Thomas Heidkamp.

On June 20, 2003, Thomas Heidkamp, as Trustee, commenced this adversary proceeding, suing Volute Enterprises, Inc., Mr. Schaefer, and Ms. Hyon, collectively referred to as the Defendants, and sought to recover and set aside a transfer of certain income-producing commercial property owned by the Debtor which, according to the Trustee was voidable as a fraudulent transfer, pursuant to Section 544(b) of the Bankruptcy Code and Section 726.106, et. seq. of Florida Statutes.

In due course the Trustee caused the issuance of summons for the three Defendants. The summonses were served only on Ms. Rogers for each Defendant named in this adversary proceeding. It is the Defendants contention that Ms. Rogers was not authorized to accept service of process on their behalf.

Be that as it may, on July 18, 2003, the Trustee filed for the record the original Acceptance of Service of Process on Defendants, which reflected that service was affected on Defendants' counsel on June 27, 2003. Notwithstanding receipt of service, Ms. Rogers failed to file any defensive motions or an answer on behalf of the Defendants. It appears and Ms. Rogers now contends that she was involved in two separate automobile accidents during this time, and as a result of the accidents, she suffered a serious concussion; her judgment was impaired; and she had memory lapses and was not able to function properly while representing the Defendants. The first automobile accident occurred September 12, 2003, (approximately two months after the answer was due), and the second accident occurred on May 28, 2004.

On July 28, 2003, the Trustee filed a Motion for Entry of Default, and on August 21, 2003, the Clerk entered the default against Volute

Enterprises, Inc., Reid Schaefer, and Gina Hyon a/k/a Gina Schaefer, Defendants.

On November 26, 2003, Ms. Rogers apparently during her lucid interval, filed a Motion to Stay (Doc. No. 13) and also a Motion to Set Aside Entry of Default. (Doc. No. 14). Both Motion filed by Ms. Rogers were promptly scheduled for hearing, however, on December 18, 2003, the date of the hearing, this Court was notified telephonically that Ms. Rogers will not be able to attend the hearing since she was ill. For the reason stated above, the Court announced in open court that the Motions which were presently before the Court are to be reset for hearing. It appears that during this time period Mr. Schaefer was diagnosed with having a terminal melanoma and it was predicted that he had ninety days to live. It also appears during this time period Ms. Hyon had a hysterectomy which, unfortunately for Ms. Hyon, turned out to be a disaster. Due to the injuries sustained during her operation, Ms. Hyon had to undergo several medical procedures including an additional operation.

On February 5, 2004, the rescheduled hearing date, on the Motion to Stay and on the Motion to Set Aside Entry of Default, Ms. Rogers, although served notice, failed to appear and failed to seek a continuance. On February 18, 2004, this Court entered an Order Denying the Motion to Stay (Doc. No. 19). On February 24, 2004, this Court entered an Order Denying Motion to Set Aside Entry of Default. (Doc. No. 21).

On May 27, 2004, the day before Ms. Rogers' second accident, Ms. Rogers filed a Verified Motion to Set Aside Order of February 24, 2004, Denying Motion to Set Aside Default and Incorporated Memorandum of Law. (Doc. No. 29). On August 27, 2004, this Court entered its Order denying said Motion.

On February 15, 2005, this Court issued an Order directing the Trustee to Show Cause why this adversary proceeding should not be dismissed for lack of prosecution. On February 24, 2005, the Trustee filed a written Response to the Order to Show Cause and on the same day filed a Motion for Final Judgment by Default. (Doc. No. 40).

On March 14, 2005, this Court entered an Order and granted the Trustee's Motion for Final Judgment by Default. On the same day, this Court entered a Final Judgment in favor of the Successor Trustee Shari Jansen and against all three Defendants in the amount of $873,050.46, plus prejudgment interest calculated at a rate of 9 percent per annum, calculated at the per diem rate of $215.27 from September 23, 2002, up to and including March 4, 2005, the date of the entry of the judgment, in the amount of $193,742.54. Thus, the Final Judgment entered against all three Defendants totaled $1,066,793.00. The Final Judgment further provided that interest shall accrue at a rate of 3.2 percent per annum until paid in full.

Although Ms. Rogers never filed a Motion to withdraw and technically she is still counsel of record for these Defendants, on March 14, 2004, Ms. Stephanie M. Biernacki, of the law firm of Gray Robinson, filed a notice of appearance on behalf of the Defendants (Doc. 48). On March 21, 2005, Mr. John Anthony, of the firm of Gray Robinson, filed Defendants' Motion for Relief from Default Judgment Orders under Federal Rule Bankruptcy Procedure 9024. On the same day, Ms. Biernacki, on behalf of the Defendants, filed for the record, affidavits of Reid Shafer, Kevin McNeeley, Gina Hyon, George Donald Briggs, Dennis McKenzie Gayle and Nancy Reynolds in support of the Defendants' Motion.

On March 21, 2005, the Defendants, through Mr. Anthony, filed an Answer to the Complaint, coupled with affirmative defenses.

On April 5, 2005, the Trustee filed the affidavit of S. Dean Kaestner in opposition to the Motion for Relief. On the same date, the Defendants filed the affidavit of L. Kirk Rogers in support of Defendants Motion for Relief.

These are the relevant facts as established by the record, based on which counsel for the Defendants contends they are entitled to relief from the default judgment, pursuant to 60(b), as adopted by F.R.B.P. 9024. Rule 60(b)(6) provides that relief may be granted on "any other reason justifying relief from operation of the judgment."

In support of the Motion, counsel for the Defendants contends that this record is replete with evidence that Ms. Rogers who was counsel of record for the Defendants was in fact incapacitated due to serious automobile accidents and her failure

to appropriately represent the Defendants was attributable to her memory loss and confused state of mind. In order to overcome a well-established principle that if an attorney who represents a party fails to discharge his or her duty properly in representing a defendant, most importantly, to timely respond to a complaint, it is the duty of the parties to seek assistance. The Defendants contend that because Mr. Schafer was suffering from terminal melanoma, undergoing excruciating pain and extensive radiation treatments which were very debilitating, and because Ms. Hyon had the unfortunate experience with a botched hysterectomy operation at the same time, this prevented both Mr. Schaefer and Ms. Hyon from properly attending to their affairs. Therefore, the Defendants contend that based on these facts, they are entitled to the relief they are seeking and should be given an opportunity to defend against the lawsuit to which they have asserted meritorious defenses.

In opposition to the Motion, counsel for the Trustee concedes that it is well established, that courts generally liberally construe the requirements of Rule 60(b) motions when reviewing default judgment. Gulf Coast Fans, Inc. v. Midwest Electronics Importers, Inc., 740 F.2d 1499, 1510-11 (11th Cir. 1984); Fackelman v. Bell, 564 F.2d 734, 735-36 (5th Cir. 1977). The approach is justified when reviewing any order which in fact, "abridged the adversary process," even if the matter under consideration was not a default judgment. Burton v. G.A.C. Finance Co., 525 F.2d 961, 962 (5th Cir. 1976).

In the case of Seven Elves, Inc. v. Eskenazi, 635 F.2d 396 (5th Cir. Unit A 1981), the District Court refused to vacate the judgment it entered against a defendant when the defendant failed to appear at the trial. The Fifth Circuit reversed, concluding that both the defendants' reliance on counsel and the good faith misunderstandings that caused counsel's failure to appear, "the equities mitigated strongly in favor to grant the relief." Id. at 403. *See also* Boughner v. Secretary of H.E.W., 572 F.2d 976 (3rd Cir. 1978); L.P. Steuart, Inc. v. Matthews, 329 F.2d 234 (D.C. Cir.), *cert. denied*, 379 U.S. 824, 85 S.Ct. 50, 13 L.Ed.2d 35 (1964); Transport Pool Division of Container Leasing, Inc. v. Joe Jones Trucking Co., 319 F.Supp. 1308 (N.D. Ga. 1970); Solaroll Shade and Shutter Corp., Inc., v. Bio-Energy Systems, Inc., 803 F.2d 1130, 1133 (11th Cir. 1986).

Considering the totality of the circumstances and Ms. Rogers mental and physical condition during the relevant time, coupled with the unfortunate critical health problems of the Defendants, this Court is satisfied that the Defendants' Motion for Relief from Default Judgment Orders Under Federal Rule of Bankruptcy Procedure 9024 is well taken and should be granted.

Accordingly, it is

ORDERED, ADJUDGED and DECREED that the Motion for Relief from Default Judgment Orders under Federal Rule of Bankruptcy Procedure 9024 be, and the same is hereby, granted and the Final Judgment entered by this Court on March 14, 2005, be, and the same is hereby, vacated. It is further

ORDERED, ADJUDGED and DECREED that the Answer filed by the Defendants, Reid Schaefer, Gina Hyon and Volute Enterprises, Inc. be, and the same is hereby, accepted as filed. It is further

ORDERED, ADJUDGED and DECREED that a pretrial conference shall be held on May 10, 2005, beginning at 9:00 a.m. at Courtroom 9A, Sam M. Gibbons United States Courthouse, 801 N. Florida Ave., Tampa, Florida. At the pretrial conference this Court shall consider all pending Motions, which were deferred by this Court on April 5, 2005.

DONE AND ORDERED at Tampa, Florida on April 13, 2005.

/s/ Alexander L. Paskay
ALEXANDER L. PASKAY
United States Bankruptcy Judge